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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILL McCAIN III, Defendant and Appellant.	E035426 (Super.Ct.No. RIF105229) **OPINION**

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and Barry J. T. Carlton, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of (1) vandalism, in violation of Penal Code section 594,[1] as a lesser offense to the charge of damaging a telephone line in violation of section 591 (count one); (2) willful failure to appear, in violation of section 1320.5 (count two); and (3) violation of a protective order, in violation of section 273.6 (count three). Defendant admitted one prison prior, for a 1991 burglary, and four "strikes" -- the 1991 burglary and robberies in 1975, 1977, and 1979.

At sentencing, the court determined the failure to appear to be a misdemeanor pursuant to section 17, subdivision (b), leaving defendant convicted of three misdemeanors. The court imposed one year in county jail, consecutive, for each offense, for a total of three years.

On appeal, defendant argues (1) the evidence did not support the charge of failure to appear, and (2) the court erred in admitting evidence of prior domestic violence pursuant to Evidence Code section 1109. We affirm the judgment.

I

FACTS

A. *Prior Incidents of Domestic Violence*

1. *January 2001*

Defendant and his wife were married in April 1998. In January 2001, defendant and Ms. McCain had an argument over defendant coming home late and not going to work. Defendant squeezed Ms. McCain's neck, hit her, and started choking her.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Ms. McCain did not report the incident to the authorities, because she did not want to get defendant in trouble.

2. *Mother's Day 2001*

On Mother's Day 2001, defendant went, he said, to Los Angeles to visit his mother. Ms. McCain stayed home, and her adult son visited her there. Defendant called and asked, "What's going on in the house?" He and Ms. McCain got into an argument. Ms. McCain's son took the phone and talked to defendant. When her son gave the phone back, defendant told Ms. McCain, "Don't disrespect my house." Ms. McCain persuaded her son to leave.

About 20 minutes later, defendant arrived at the house, which was in Moreno Valley. He stormed into the house, knocking things over and leaving the doors open. He went upstairs, where Ms. McCain was sitting with her grandson. He wanted to know where Ms. McCain's son was. Defendant took a glass of juice Ms. McCain was drinking and threw it against the wall, making a hole in the wall.

Defendant then grabbed Ms. McCain by the neck with both hands and tried to choke her. He hit her, and she went to grab the phone and dialed 911. The operator dispatched the police, but defendant left the house before the police arrived.

B. *Current Charges*

1. *Counts one and three -- vandalism, violation of restraining order*

In July 2001, defendant filed for divorce. Ms. McCain got a restraining order prohibiting defendant from contacting her.

On December 15, 2001, Ms. McCain was at home about 9:30 p.m. when she noticed the sensor lights on the side of the house kept going on and off. She also heard

dogs barking. She looked out an upstairs window and saw defendant outside near a flower bed at the side of the garage door. Ms. McCain tried to call 911, but her phone was dead.

The next day about 6:00 a.m., Ms. McCain discovered her phone lines had been cut. She drove to a pay phone, called 911, and told the operator what had happened.

2. *Count two -- failure to appear*

The People filed the present case in August 2002. The original complaint charged defendant with damaging a telephone line and violating a restraining order.

On October 23, 2002, defendant filed a waiver of personal presence pursuant to section 977. The waiver stated in part: "The undersigned defendant . . . hereby agrees that his interest will be deemed represented at all times by the presence of his attorney the same as if the defendant himself were personally present in court, and further agrees that notice of his attorney that his presence in court on a particular day at a particular time is required will be deemed notice to him of the requirement of his appearance at said time and place."

On October 24, 2002, Deputy District Attorney Michael Mayman filed an amended complaint and gave notice that he was requesting a bail hearing to review the amount of bail involved in the case.

Also on October 24, the parties appeared for a trial readiness conference. Defendant was not personally present. Attorney Brian Saunders appeared on defendant's behalf, pursuant to his section 977 waiver. At that time, trial was set for November 12, 2002. However, the parties agreed, and the court ordered, that the trial readiness

conference would be continued to November 12, and the bail hearing also would be held on that date.

Around November 6, 2002, Mayman received a telephone call from Saunders, who stated he had been temporarily suspended from practice for not completing some required training. Therefore, Saunders stated, he would have to withdraw from the case at least temporarily.

Around the same time, Saunders set up a three-way conference call with Mayman and defendant. Saunders told defendant "he had to be here," and Mayman told defendant "that he had to be here on November 12." Defendant did not have any questions about those directions.

On November 12, Saunders told Mayman he had received a phone call saying defendant was in the hospital. Mayman asked Saunders to provide documentation and later received by fax an admission form indicating defendant had been admitted to Pomona Valley Hospital Medical Center.

The faxed admission form was two pages long. On the first page was what appeared to be a stamp or sticker indicating defendant was admitted to the hospital on "08/17/1999" at "05:37"; that defendant's date of birth was "08/31/1951"; and that defendant's age was "47Y."

On the second page of the form was an almost identical stamp or sticker. The only difference between this stamp or sticker and the one on the first page was that the one on the second page indicated an admission date of "11/11/2002," the day before the hearing Saunders and Mayman had told defendant he had to attend. All of the other information was exactly the same. In other words, according to the document faxed to the district

attorney, defendant was admitted to the hospital on two different dates, August 17, 1999, and November 11, 2002, but on each date his time of admission (5:37 a.m.) and his age (47 years) were exactly the same, despite the fact defendant, if his birthday was August 31, 1951, as stated in the document, was 51 years old on November 11, 2002.

Defendant did not appear at the November 12 hearing. Mayman showed the faxed admission form to the court, and the court continued the hearing to the following day. The court also issued, but held, a warrant for defendant's failure to appear.

Defendant did not appear on November 13 either. The court released the warrant.

On January 3, 2003, defendant presented a check, along with a Nevada identification card, at a check-cashing facility in Las Vegas, Nevada.

II

DISCUSSION

A. *Sufficiency of Evidence of Failure to Appear*

Defendant contends the evidence was insufficient to support his conviction on count two, for failure to appear in violation of section 1320.5. That section provides in relevant part: "Every person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." Defendant contends that in this case, there was insufficient evidence to show he was *required to appear* on the dates he failed to appear or that he was validly notified he was required to appear.

1. *Standard of review*

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is

reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 370.)[2]

2. *Analysis*

Defendant first argues there was no evidence that the court *ordered* his attorney to have him personally appear at the November 12, 2002, hearing or revoked the section 977 waiver. He notes the transcript of the October 24 hearing does not reflect any such order.

Section 1320.5 does not require that the defendant fail to appear "as ordered by the court." It requires that the defendant fail to appear "as required." The statute applies to anyone "who in order to evade the process of the court willfully fails to appear as required . . . ." There is no requirement in the statute that the defendant be "required" to appear by virtue of an express *order* of the court.

The court in *People v. Jimenez* (1995) 38 Cal.App.4th 795 held the trial court erred in ruling the defendant could not violate section 1320.5 in the absence of a court order to appear: "The plain language of the statute does not specify a court order is necessary to make the defendant's presence 'required,' and Jimenez does not direct us to

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[2] Defendant asserts the "no hypothesis" standard is outmoded. The Supreme Court's continued reference to that standard in 1998 and 2002 convinces us otherwise.

legislative history showing the Legislature intended otherwise. In section 1320, dealing with failures to appear when released on one's own recognizance, the Legislature also used 'as required,' but in section 1318, dealing with agreements for recognizance releases, the Legislature used the phrase '[t]he defendant's promise to appear at all times and places, *as ordered by the court* . . . .' (Italics added.) The Legislature obviously was aware of the distinction and could have used the same language in sections 1320 and 1320.5 had it chosen to do so." (*Jimenez*, at pp. 798-799, fns. omitted.)

In *People v. American Bankers Ins. Co.* (1990) 225 Cal.App.3d 1378, the court reached the same conclusion with respect to section 1305, which provides that a court shall order forfeiture of bail where a defendant fails to appear on any occasion on which "the defendant's presence in court is lawfully required." (§ 1305, subd. (a)(4).) The *American Bankers* court rejected the argument that "the defendant's presence would be 'lawfully required' only if the court expressly ordered her to be present." (*American Bankers,* at p. 1380.)

Here, similarly, the record established that, even without an express court order, defendant was required to appear on November 12. According to Mayman, Saunders said on November 6 that he had been suspended from practice.[3] Under the terms of his section 977 waiver, defendant was "deemed represented at all times by the presence of his attorney . . . ." Saunders, as a suspended attorney, could not represent defendant in court pursuant to the section 977 waiver and thus could not appear in place of defendant

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[3] This was double hearsay, but defendant did not object to it.

on November 12. The necessary consequence was that defendant was required to appear personally on that date.

Defendant points out that in *People v. Jimenez*, *supra*, 38 Cal.App.4th 795 and *People v. American Bankers Ins. Co.*, *supra*, 225 Cal.App.3d 1378, the defendants had not filed section 977 waivers, and there was a statute or court rule requiring the defendants' appearances. The fact defendant filed a section 977 waiver is not a valid distinction between this case and *Jimenez* and *American Bankers*, because as discussed, *ante*, the waiver was conditioned on defendant appearing through an attorney. That condition was not met, because Saunders could not represent defendant due to his suspension.

Moreover, contrary to defendant's assertion, there was a court rule requiring him to be present at the November 12 hearing. California Rules of Court, rule 4.112(a) provides: "A readiness conference shall be held within 1 to 14 days before the date set for trial. Trial counsel shall appear and be prepared to discuss the case and determine whether the case can be disposed of without trial. The prosecuting attorney shall have authority to dispose of the case, and *the defendant shall be present in court*." (Italics added.)

The November 12 hearing was a continuance of the October 24 hearing, which was a trial readiness conference. Defendant therefore was required to be present at that hearing.

Defendant also was required to appear on November 13. The court took judicial notice, and Mayman testified, that on November 12 the court issued and held a warrant, and on November 13 the warrant was released to law enforcement. A warrant for failure

to appear directs the arrest and recommitment of the defendant. (§ 1310, subd. (a).) The issuance of a warrant therefore is a requirement that the defendant appear before the court. The court's obvious purpose in issuing the warrant was to compel defendant's attendance on November 13.

Defendant asserts there was no evidence he was *informed* Saunders had been suspended and therefore could not appear on defendant's behalf. We have two responses. First, section 1320.5 does not require that the defendant be "informed" he must appear. It requires that the defendant fail to appear "as required," and that he do so "in order to evade the process of the court."

As shown, *ante*, the record established defendant was required to appear. The record also established, abundantly, that defendant failed to appear in order to evade the process of the court. On November 12, he faxed a document to the district attorney which obviously had been altered to make it appear defendant had been in the hospital on November 12, when in fact he was there in August 1999. Defendant then *again* failed to appear the following day and was not heard from again until he was located in Nevada.

It was reasonable for the jury to infer defendant failed to appear in order to evade the process of the court. If defendant thought he did not have to obey orders to appear from an "ersatz attorney" as he now claims, he would not have taken these actions to (1) try to excuse his nonappearance on November 12 and (2) avoid apprehension by being out of the state.

Our second response is that, even if a requirement that the defendant be *informed* he must appear personally can be implied from section 1320.5, any such requirement was satisfied in this case. Although defendant asserts there was no actual evidence he was

informed of Saunders's suspension, it would be more accurate to say there was no *direct* evidence. Of course, there did not have to be. "Circumstantial evidence is as sufficient to convict as direct evidence. [Citations.]" (*People v. Reed* (1952) 38 Cal.2d 423, 431.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

As discussed, *ante*, there was ample circumstantial evidence defendant knew he was required to appear, in the facts that he tried to justify his nonappearance with fraudulent evidence and absented himself from the state. Further, there was *direct* evidence Saunders told defendant on November 6 that "he had to be here . . . ." The fact there was no direct evidence Saunders told defendant *why* he had to appear -- because Saunders had been suspended -- did not preclude the jury from concluding defendant knew his personal presence was required.

Defendant contends that since Saunders was suspended, there was no attorney to convey to defendant the purported necessity of reappearing in person with new counsel. Again, section 1320.5 does not require that the defendant be advised by an actively licensed attorney of the requirement that he appear. It requires that the defendant be required to appear and that he fail to do so to evade the process of the court.

Defendant contends the People cannot rely on the incapacity of Saunders to appear on behalf of defendant pursuant to the section 977 waiver as a theory to support the conviction for failure to appear, because they did not argue that theory to the jury or in opposition to defendant's motion for acquittal pursuant to section 1118.1.

"Generally, on appeal, a judgment or order will be affirmed if it is correct on any theory, regardless of the trial court's reasons; thus, a respondent may assert a new theory to establish that an order was correct on that theory '*unless* doing so would unfairly prejudice appellant by depriving him or her of the opportunity to litigate *an issue of fact*.' [Citation.]" (*Bailon v. Appellate Division* (2002) 98 Cal.App.4th 1331, 1339.) This rule applies in civil and criminal cases alike. "In terms of the nature and scope of review, the function of an appellate court is substantially the same in civil and criminal appeals. [Citations.]" (*Id*. at p. 1339, fn. 3.)

Hence, as long as the facts pertaining to a legal theory were fully developed in the trial court, the People can rely on the theory on appeal even though they did not argue it below. In *People v. Sims* (1993) 5 Cal.4th 405, for example, the California Supreme Court held the People could rely on the "public safety" exception to the *Miranda*[4] rule even though they had not done so in the trial court: "Because the record fully supports the public safety doctrine as a basis for affirming the trial court's ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory, we conclude the Attorney General is not precluded from relying upon this theory in seeking to uphold the trial court's ruling. [Citation.]" (*Sims*, at p. 450, fn. 9.)

Here, the facts pertaining to the People's theory that Saunders's suspension meant defendant had to appear personally on November 12 and 13, despite the section 977 waiver, were fully developed in the trial court. Defendant's section 977 waiver was

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

admitted in evidence. The waiver stated that defendant agreed his interest would be "deemed represented at all times by the presence of his attorney the same as if the defendant himself were personally present in court . . . ." The necessary corollary to that agreement was that if defendant's interest was *not* represented by an attorney, defendant would have to be present himself.

The fact Saunders was suspended also was fully developed. Mayman testified, without contradiction, that Saunders had said so. It does not appear there were any relevant contradictory facts that defendant failed to introduce due to the People's failure to raise their theory below. In fact, the record indicates that when Saunders sought to withdraw from the case, he declared under penalty of perjury that he had confirmed he had been placed on administrative inactive status due to a failure to complete continuing legal education requirements.

Whether Saunders informed defendant of his suspension may have been in dispute, but the facts relating to it were not. The relevant circumstances -- the fact both Saunders and Mayman told defendant he had to appear on November 12, the fact defendant then faxed fraudulent information and did not reappear until he was found outside the state -- were not contradicted. Whether defendant was told expressly that Saunders was suspended was an inference for the jury to draw based on the facts.

Again, it does not appear there was favorable evidence on the issue that defendant could and would have introduced had the People asserted their current theory in the trial court. To the contrary, the record showed Saunders declared under penalty of perjury that on November 4, 2002, *defendant* informed *Saunders* that Saunders had been placed on administrative inactive status. Presumably, defendant would not have wanted to

introduce that evidence regardless of what the People argued, since it would undercut any claim that he did not know of the suspension.

As the relevant facts were before the jury, they reasonably could infer, whether or not the People argued it, that defendant was required to appear personally despite his section 977 waiver due to Saunders's suspension. Under the substantial evidence rule, we must presume the jury drew that inference. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) We therefore conclude sufficient evidence supported the conviction on count two.

B. *Admission of Prior Instances of Domestic Violence*

Defendant contends the admission of the January 2001 and Mother's Day 2001 incidents of domestic violence between him and Ms. McCain, pursuant to Evidence Code section 1109, denied him due process and a fair trial on all three counts. He contends the evidence of those incidents was not admissible under section 1109 because the current offenses did not involve domestic violence, and the evidence was unduly prejudicial, so that the court should have excluded it pursuant to Evidence Code section 352.

1. *Standard of review*

"The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion. [Citations.]" (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) A trial court's ruling on the admissibility of evidence under section 352 is reviewed under the same standard. (*People v. Cox* (2003) 30 Cal.4th 916, 955.)

2. *Analysis*

a. *Domestic violence*

Evidence Code section 1109 provides in relevant part that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (*Id.*, subd. (a)(1).) Section 1109 further provides: "As used in this section, 'domestic violence' has the meaning set forth in Section 13700 of the Penal Code." (*Id.*, subd. (d).)

Section 13700 provides in relevant part: "'Domestic violence' means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." (*Id*., subd. (b).) Section 13700 further provides: "'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (*Id*., subd. (a).)

Thus, for a crime to involve domestic violence for purposes of Evidence Code section 1109, it must either involve actual or attempted bodily injury, or must involve placing the victim in reasonable apprehension of imminent serious bodily injury. Defendant argues none of the current offenses involved domestic violence under this standard, and therefore the past domestic violence incidents did not qualify for admission under section 1109.

As there was no evidence defendant attempted to, or did, inflict bodily injury on Ms. McCain on December 15, 2001, the issue before the trial court was whether the

vandalism and violation of a restraining order that defendant committed on that date placed Ms. McCain in *reasonable apprehension* of imminent serious bodily injury. To determine that issue, the court conducted a pretrial hearing pursuant to Evidence Code section 402, at which Ms. McCain explained how she felt when she saw defendant outside her house on the night of December 15, 2001: "He had threatened to attack before, and I didn't know if he was trying to get in the house again this time to do bodily harm to me. So I was just assuming that he would try to get into the house and do something because of the three prior incidents that happened before, in the past, what we were going through."[5]

The court ruled the prior incidents were admissible under Evidence Code section 1109, because Ms. McCain was afraid on December 15, 2001, because of the past incidents. It admitted the January 2001 and Mother's Day 2001 incidents on that basis. Defendant challenges that ruling.

Defendant first asserts that to cause a victim to suffer fear of *imminent* serious bodily injury, an incident must involve a far more immediate, concrete, and physically proximate sort of assault on the person than vandalism to the outside of a house. We see no reason why the definition of "domestic violence" in section 13700 should be limited in that fashion. The words of section 13700 contain no such limitation. The statute requires

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[5] There was a third prior incident of domestic violence, in November 2000, but the court excluded it, so we do not address it here.

reasonable fear of imminent serious bodily injury, not a direct physical confrontation or a display of violence.

A defendant's conduct can place a victim in reasonable fear of serious bodily injury without involving any violence. In *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, the court, speaking in reference to a domestic violence restraining order, noted that even "placing annoying telephone calls or sending unwanted e-mails, letters, or the like" can cause such a reaction: "[T]his sort of non-violent behavior in some circumstance can 'place [the other person] in *reasonable apprehension of imminent serious bodily injury*.'" (*Id*. at p. 1299.)

In deciding whether conduct is sufficient to cause reasonable fear of serious bodily injury, a court can consider not only the conduct itself, but also all of the surrounding circumstances, including the parties' past history. Section 422, which prohibits terrorist threats, requires that the threat be "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." In *People v. Mendoza* (1997) 59 Cal.App.4th 1333, the court held that for purposes of section 422, "the determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances. [Citations.]" (*Mendoza*, at p. 1340.)

Here, the parties' history -- i.e., the prior incidents of domestic violence -- strongly supported a finding that defendant's conduct on December 15, 2001, was sufficient to cause Ms. McCain to suffer a reasonable fear of serious bodily injury. As she testified at the Evidence Code section 402 hearing, the past incidents caused her to fear defendant would enter her house and injure her. Added to the past incidents were the circumstances that (1) Ms. McCain was a woman living alone except for her infant grandson; (2) the intrusion occurred late at night; (3) defendant remained at the house longer than necessary simply to cut the lines, as Ms. McCain testified the sensor lights went on and off "for an extended time period," perhaps 10 minutes; (4) the dogs' barking evidently did not deter defendant; and (5) the fact there was a restraining order prohibiting defendant from any contact with Ms. McCain evidently did not deter him either.

Under these circumstances, a reasonable person would fear imminent serious bodily injury. It is common for home intruders to cut their victims' telephone lines to prevent them from summoning help. When she saw defendant, Ms. McCain immediately ran downstairs to get the phone to call 911 and found the line was dead. She reasonably could believe at that point that defendant had cut the line because he was about to enter and injure her as he had done in the past.

Defendant notes that in *People v. Aris* (1989) 215 Cal.App.3d 1178 this court held self-defense instructions were not required where a woman shot her husband while she sat on the bed on which he was sleeping, despite the fact he had abused her in the past. This court concluded that "[n]o 'jury composed of reasonable men could have concluded that' a sleeping victim presents an imminent danger of great bodily harm . . . ." (*Id*. at p. 1192.)

In *Aris*, however, the victim (1) waited about 10 minutes to make sure her husband was asleep; (2) then went next door to get some ice; (3) found a handgun on the top of the refrigerator and took it; (4) walked back to her residence (5) returned to the bedroom; (6) sat down on the bed, and *then* shot her husband five times in the back while he was asleep in the bed. (*People v. Aris*, *supra*, 215 Cal.App.3d 1178, 1184-1185.) No comparable circumstances existed here. Defendant was not asleep, and Ms. McCain did not proceed in the leisurely manner in which the victim in *Aris* did. She immediately tried to summon help.

Moreover, in *People v. Humphrey* (1996) 13 Cal.4th 1073, the Supreme Court held *Aris* "too narrowly interpreted the reasonableness element" of self-defense, because it "failed to consider that the jury, in determining objective reasonableness, must view the situation from the *defendant's perspective*." (*Id*. at p. 1086.) Viewing the situation in this case from Ms. McCain's perspective amply supports the trial court's conclusion that her fear of imminent serious bodily injury was reasonable.

Defendant also cites *People v. Minifie* (1996) 13 Cal.4th 1055 for the proposition that the more attenuated and vague the threat, the less reasonable it is to entertain a fear of imminent and serious bodily harm. In *Minifie*, however, the Supreme Court was speaking of *third-party* threats. It noted that, in a case in which a defendant charged with assault with a deadly weapon claims self-defense, evidence of threats to the defendant from someone other than the victim is less probative than evidence of a threat from the victim himself. (*Id*. at p. 1070.) Here, of course, the threat that Ms. McCain perceived did not come from an unknown third party, but from defendant, who had proven himself

willing to do physical violence to her. The court did not abuse its discretion in admitting the evidence of past domestic violence under Evidence Code section 1109.

b. *Undue prejudice*

Defendant contends the prior incidents of domestic violence were too horrific, compared to the current charges, to properly be admitted under Evidence Code section 352. Section 352 grants the court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." Defendant contends the prior incidents were so inflammatory, due to the violence they involved, that their probative value was outweighed by the potential for prejudice if they were admitted.

The evidence of the prior incidents was highly probative on the issue of identity. Although Ms. McCain testified she saw defendant outside her house on December 15, 2001, she did not say she saw him cut the lines. There was no physical evidence, such as fingerprints, to prove it was defendant and not someone else who cut the lines. The defense emphasized the fact Ms. McCain made her identification of defendant at night, from a second-story window.

The evidence of the prior incidents showed defendant's propensity to harass Ms. McCain and disrupt her life. Particularly probative on this point was the Mother's Day 2001 incident, in which defendant interrupted Ms. McCain's visit with her son, causing her to persuade her son to leave. Defendant also demanded to know what was "going on" in his absence and returned home with an apparent intention to take some action against the son. In addition, when Ms. McCain tried to call for help, defendant threw the phone out of her hand.

The evidence of this incident was probative of defendant's tendency to become enraged at Ms. McCain without any apparent provocation and to try to prevent her from summoning help. This evidence explained why defendant would continue his vendetta against Ms. McCain when they no longer lived together and, hence, had a tendency to prove it was he who cut the lines.

The prior incidents also were probative of malice. Both section 591, under which defendant was originally charged, and section 594, under which he was convicted, require that the defendant act "maliciously." (§ 591; § 594, subd. (a).) "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (§ 7, clause 4.) The prior incidents demonstrated defendant acted with malice toward Ms. McCain in January and May 2001 and thus had a tendency to prove he also acted with that state of mind in December 2001.

The probative value of the evidence was not outweighed by the potential for prejudice. While the prior incidents involved actual violence, and the current incident did not, viewed from Ms. McCain's perspective under all of the circumstances the current incident was a nightmarish experience. The violent nature of the prior incidents did not make those incidents so inflammatory in comparison with the current offenses that the jury was likely to be unduly prejudiced against defendant. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638 .) The court did not abuse its discretion in not excluding the evidence under Evidence Code section 352.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.